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No. 84-206

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

FRANCIS X. BELLOTTI,
As He Is ATTORNEY GENERAL FOR THE
COMMONWEALTH OF MASSACHUSETTS,
PETITIONER,

v.

PLANNED PARENTHOOD LEAGUE
OF MASSACHUSETTS, INC.,
RESPONDENT.

On Petition for a Writ of Certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

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QUESTION PRESENTED

1. Did the Massachusetts Supreme Judicial Court correctly determine that a Massachusetts statute prohibiting charitable solicitation by paid telephone operators, while permitting all commercial solicitation over the telephone and charitable solicitation by volunteer telephone operators, was not narrowly drawn to advance the asserted state interest in protecting residential privacy and was therefore facially unconstitutional under the First Amendment?

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent Planned Parenthood League of Massachusetts, Inc., respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Massachusetts Supreme Judicial Court's opinion in this case. That opinion is reported at 391 Mass. 709, 464 N.E.2d 55 (1984).

STATEMENT OF THE CASE

Planned Parenthood League of Massachusetts, Inc. ("PPLM") is a charitable organization whose activities include education and lobbying with respect to family planning issues. In years prior to 1982, PPLM had conducted campaigns to recruit participants in its legislative alert network and to solicit contributions by means of direct mail and by using volunteers to make telephone calls. PPLM was not satisfied with the results of those efforts and therefore decided, in early 1982, to conduct a recruitment and solicitation campaign by telephone using operators hired for the purpose. The campaign was not directed to the public at large; rather, calls were to be made to a selected group of approximately 5,100 persons who were current or former

associate members of PPLM, or had previously indicated their interest in or support for PPLM's activities. PPLM planned a telephone campaign for 1983 solely for the solicitation of contributions, again using operators hired for that purpose. 391 Mass. at 710-11, 464 N.E.2d at 58; see also Appendix B to Petition for Writ of Certiorari at 2-3 (reproducing the Superior Court's decision).

On August 24, 1982, PPLM filed a complaint in the Massachusetts Superior Court, seeking a declaratory judgment that a Massachusetts statute, G.L. c. 68, §28 ("Section 28"), prohibiting charitable solicitation by paid telephone

operators,* was facially unconstitutional in violation of PPLM's rights to freedom of speech and association and equal protection under the First and Fourteenth Amendments to the United States Constitution, and that the statute was unconstitutionally vague and overbroad. The parties stipulated to the facts of the case and stipulated that telephone solicitation is a more effective means of providing information and obtaining

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*Massachusetts G.L. c. 68, §28 provides:

> No charitable organization shall conduct or make any solicitation of contributions by means of paid telephone operators whose principal duties are the conducting of such telephone solicitation.

The term "charitable organization" is broadly defined in G.L. c. 68, §18 to include all individuals and groups holding themselves out as charitable, educational, humane, or patriotic organizations, whether or not they receive any tax exemption.

contributions than direct mail solicitation. The Massachusetts Superior Court, Fine, J., declared Section 28 to be unconstitutional on its face as a violation of freedom of speech, and enjoined its enforcement. The court found it unnecessary to reach PPLM's other constitutional claims. See Appendix B.

The Massachusetts Supreme Judicial Court granted direct appellate review and, on April 23, 1984, affirmed the judgment of the Superior Court. 391 Mass. 709, 464 N.E.2d 55. In a unanimous decision by Liacos, J., the Supreme Judicial Court held Section 28 to be facially invalid under the First Amendment. 391 Mass. at 710, 464 N.E.2d at 58. The Supreme Judicial Court thus also found it unnecessary to consider other constitutional infirmities of the

statute. 391 Mass. at 717 n.13, 464 N.E.2d at 62 n.13.

REASONS FOR DENYING THE WRIT

The decision of the Massachusetts Supreme Judicial Court holding the Massachusetts statute in question unconstitutional on its face is compelled by the reasoning adopted by this Court in Martin v. City of Struthers, 319 U.S. 141 (1943), and Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980), and most recently reaffirmed in Secretary of State of Maryland v. Joseph H. Munson Co., 104 S.Ct. 2839 (1984).

Moreover, the decision below presents no novel issues of law. The "public forum-private forum" distinction referred to by the Attorney General has no relevance whatsoever to the present

case. The authorities cited by the Attorney General, Perry Education Association v. Perry Local Educators' Association, 103 S. Ct. 948 (1983) and Members of the City Council of Los Angeles v. Taxpayers for Vincent, 104 S. Ct. 2118 (1984), concern the government's regulation of access to its own property when such property is not a "public forum." In contrast, the statute at issue here represents the government's selective regulation, based on content, of charitable organizations' right to engage in protected speech through telephones owned or controlled by private individuals. Such communication is flatly banned, regardless of whether the individuals wish to permit or deny access to their telephones. This is censorship of the most blatant sort.

I. THE DECISION OF THE MASSACHUSETTS SUPREME JUDICIAL COURT WAS COMPELLED BY PRIOR DECISIONS OF THIS COURT APPLYING FIRST AMENDMENT PROTECTIONS TO CHARITABLE SOLICITATION ACTIVITIES AND DOES NOT CONFLICT WITH ANY REPORTED DECISION.

The decision of the Massachusetts Supreme Judicial Court holding the Massachusetts statute in question, G.L. c. 68, §28, unconstitutional on its face, is merely an application of principles applied by this Court in such cases as Martin v. City of Struthers, 319 U.S. 141 (1943), and Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980), and most recently re-affirmed in Secretary of State of Maryland v. Joseph H. Munson Co., 104 S. Ct. 2839 (1984). Section 28 prohibits charitable organizations from conducting any solicitation of contributions by means of paid telephone operators whose

principal duties are such telephone solicitation. No other form of charitable solicitation is forbidden. The ban applies to all charitable organizations and to no other individuals or organizations. Its facial invalidity on First Amendment grounds was established in the court below through a straightforward application of this Court's decisions.

First, as the Supreme Judicial Court noted, 391 Mass. at 712, 464 N.E.2d at 59, this Court has established that charitable solicitation, like solicitation to support advocacy of political and other social views, constitutes protected speech under the First Amendment. Village of Schaumburg, 444 U.S. at 632-33 (charitable solicitation "on the street and door to door"); Joseph H. Munson Co., 104 S. Ct. at 2849 & n.8 (charitable

solicitation by many means, extending to telephone requests). Such solicitation is entitled to no less protection when it is carried out by paid employees. Village of Schaumburg, 444 U.S. at 631, 636-37. As the court below properly noted, even neutral regulation of solicitation

> must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and for the reality that with solicitation the flow of such information and advocacy would likely cease.

(quoting Village of Schaumburg, 444 U.S. at 632). PPLM's activities partake especially of this communicative character. 391 Mass. at 713; 464 N.E.2d at 59. Accordingly, the state is prohibited from "unreasonably obstructing or delaying"

the collection of contributions on behalf of social causes. Village of Schaumburg, 444 U.S. at 630; Jamison v. Texas, 318 U.S. 413, 417 (1943).

To assess the constitutionality of state action restricting charitable solicitations, the Massachusetts Supreme Judicial Court, 391 Mass. at 714-15, 464 N.E.2d at 60, followed this Court's decisions requiring that the statute under scrutiny be either a reasonable time, place, or manner regulation or a restriction narrowly drawn to further a substantial governmental interest without unnecessarily impairing First Amendment rights. Consolidated Edison Co. v. Public Service Commission, 447 U.S. 53 , 535-36, 540-41 (1980); Village of Schaumburg, 444 U.S. at 637; Joseph H. Munson Co., 104 S. Ct. at 2849-50.

The court below correctly determined that Section 28 is not a reasonable time, place, or manner regulation. Because it acts only to prohibit paid solicitation by charities, and not by other organizations, Section 28 cannot be said to apply to all speech irrespective of content. 391 Mass. at 714; 464 N.E.2d at 60. See Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 648-49 (1981); Consolidated Edison Co., 447 U.S. at 537-38.

The decision below also properly concluded that Section 28 is not precisely drawn to serve the state interest asserted by the Attorney General, the protection of homeowners' privacy. As the court below found, Section 28 does "virtually nothing" to protect homeowners from unwanted telephonic intrusions. 391

Mass. at 715-16, 464 N.E.2d at 61. The statute leaves households prey to the "annoying" ring of the telephone from all commercial and other noncharitable solicitations, from solicitations of charitable contributions by volunteers or by employees whose "principal duties" are not solicitation, and from unlimited interruptions by full-time paid operators for charities so long as they do not mention contributions. At the same time, the statute is too broad: as demonstrated by the facts of this case, Section 28 purports to forbid telephone solicitation campaigns limited strictly to persons with past or present affiliations with the charity or who have demonstrated interest in and support for its activities. It also prohibits calls by paid solicitors to business telephones, including those of other charitable

organizations. As both the Supreme Judicial Court and the Superior Court found, therefore, the classifications drawn by the statute bear no perceptible relationship to privacy goals. 391 Mass. at 715-16, 464 N.E.2d at 61; see also Appendix B at 9.

Finally, both courts below found that even if Section 28 furthered the state's interest in residential privacy in some way, "there are certainly less intrusive and more practicable ways of serving this objective," 391 Mass. at 716 n.11, 464 N.E.2d at 61 n.11; see also Appendix B at 8, including proposals in state and legislatures in Congress to enable individuals to request that the telephone company indicate in its directory their unwillingness to receive solicitation calls, and to require

solicitors to pay for lists of residential telephone subscribers unwilling to receive such solicitations. Id.

The Massachusetts Supreme Judicial Court's decision holding Section 28 facially unconstitutional under the First Amendment, is thus a correct, straightforward, and unexceptional application of well-established and oft-reiterated principles of this Court. The decision below does not stand in conflict with any reported decision, state or federal. The only other reported decision considering the constitutionality of such a statute is that of the federal district court in Optimist Club of North Raleigh v. Riley, 563 F. Supp. 847 (E.D.N.C. 1982). The court in Optimist Club enjoined enforcement of N.C.G.S. §14-401.12, which made it unlawful for "professional solicitors," i.e., persons paid for their

services, to solicit charitable contributions by telephone. The court concluded, as did the Supreme Judicial Court in the present case, that the statute failed to advance a compelling state interest in the least intrusive manner. 563 F. Supp at 849.

The application of well-settled First Amendment principles in the decision below thus presents no conflicts of authority and no difficulties meriting review in this Court.*

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*In any event, the judgment rendered below is supported by independent constitutional grounds not reached by the Massachusetts Supreme Judicial Court but open to this Court's determination. See Colautti v. Franklin, 439 U.S. 379, 397 n.16 (1979); Dandridge v. Williams, 397 U.S. 471, 475 n.6 (1970). As PPLM argued in the proceedings below, the statute is facially invalid as a violation of equal protection and freedom of association, and is unconstitutionally overbroad and vague.

II. THE DECISION BELOW PRESENTS NO NOVEL ISSUES OF LAW.

The Attorney General asserts that the decision of the Massachusetts Supreme Judicial Court raises two "questions of first impression": first, whether the telephone is a "public forum" or a "private forum," and second, if it is a "private forum," whether regulation of access to the telephone should escape strict scrutiny under the First Amendment. It is readily apparent that the decision below presents neither issue for consideration by this Court.

The "public forum-private forum" distinction upon which the Attorney General's argument hinges has nothing to do with this case. The doctrine underlying it has been most recently described by this Court in Members of the City Council of Los Angeles v. Taxpayers

for Vincent, 104 S. Ct. 2118, 2134 (1984):

> Public property which is not by tradition or designation a forum for public communication may be reserved by the state "for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." Perry Education Association v. Perry Local Educators' Association, 103 S. Ct. 948, 955 (1983). [Emphasis added.]

Taxpayers for Vincent and Perry Education Association both affirm a governmental entity's power to limit speech activities on its own property, when that property is not a "public forum," to those activities compatible with the "intended purposes" of the property. These decisions, and every prior decision of this Court applying the principle, concern property within the ownership or control of the unit of government asserting its power to restrict access.

See, e.g., Taxpayers for Vincent, 104 S. Ct. at 2122 (utility poles); Perry Education Association, 103 S. Ct. at 951 (school district's interschool mail-boxes); United States Postal Service v. Council of Greenburgh Civic Associations, 453 U.S. 114, 128-29 (1981) (authorized depositories of U.S. mail); Greer v. Spock, 424 U.S. 828, 830 (1976) (federal military reservation); Lehman v. Shaker Heights, 418 U.S. 298, 299 (1976) (city's rapid transit cars). This Court's precedents thus establish that the "public forum-private forum" dichotomy is merely a characterization of differing types of government property. See Perry Education Association, 103 S. Ct. at 957-58 n.9 (distinguishing Consolidated Edison Co., 447 U.S. at 530, because it did not concern access to government property). Section 28 is not a statute

involving use of government property, and therefore the line of cases culminating in Perry and Taxpayers is irrelevant here.

The second "novel issue" the Attorney General attempts to inject into this case is his assertion that protection of residential privacy is so compelling an interest that restrictions on the placing of calls to telephones of private citizens should be subject not to strict scrutiny but to some minimum rationality test.

The proposition urged by the Attorney General is not only without support in, but is directly contrary to this Court's previous decisions in First Amendment cases. Where residential privacy was asserted by the state to justify restrictions on protected speech, this Court has consistently applied a rule of strict scrutiny to such

restrictions.* See, e.g., Village of Schaumburg, 444 U.S. at 638; Carey v. Brown, 447 U.S. 455, 462 (1980); Martin v. City of Struthers, 319 U.S. at 146-48. While this Court has not had occasion to review the constitutionality of any statute directed specifically at speech by means of telephone, the lower courts have uniformly agreed that speech over telephone wires merits the same protection as speech by other means. See, e.g., Walker v. Dillard, 523 F.2d 3, 4 (4th Cir.), cert. denied, 423 U.S. 906 (1975); Optimist Club of North Raleigh,

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* A principal concern of the Attorney General appears to be the "potential for Orwellian use" of automatic diallers and other electronic devices. Neither the facts of this case nor the statute at issue involve such devices. Of course, reasonable time, place, or manner restrictions could be enacted in response to any such abuses.

563 F. Supp. at 849; Radford v. Webb, 446 F. Supp. 608, 610-11 (W.D.N.C. 1978), aff'd, 596 F.2d 1205 (4th Cir. 1979); Huntley v. Public Utilities Commision, 69 Cal. 2d 67, 442 P.2d 685, 69 Cal. Rptr. 605 (1968); People v. Klick, 66 Ill. 2d 269, 362 N.E.2d 329 (1977); State v. Blair, 287 Or. 519, 601 P.2d 766 (1979); State v. Dronso, 90 Wis. 2d 149, 279 N.W.2d 710 (Ct. App. 1979). Cf. Gormley v. Director, Connecticut State Department of Adult Probation, 449 U.S. 1023, 1023-24 (1980) (White, J., dissenting from denial of certiorari). See also In re Unsolicited Telephone Calls, 77 F.C.C. 1023, 1033-37 (1980).

Moreover, the statute at issue in the decision below does not present to this Court the question asserted by the Attorney General. As the Supreme Judicial Court and the Superior Court

both found, Section 28 "does virtually nothing to promote the State's alleged substantial interest in residential privacy." 391 Mass. at 715, 464 N.E.2d at 61. The distinctions made in the statute certainly "have nothing to do with privacy." Appendix B at 9. The essential vice of Section 28 is that by conclusively presuming that charitable appeals from paid telephone operators are always unwelcome, the statute deprives homeowners of the freedom to choose, and of the right to receive calls they may welcome, thereby invading the private decision-making sphere of each individual. In analogous contexts, this Court has repeatedly observed that the First Amendment forbids governments to label subject matters as "offensive" or "intru-

sive"* and to deprive homeowners of the opportunity to receive communications on those subjects at home. See, e.g., Bolger v. Youngs Drug Products Corp., 103 S. Ct. 2875, 2883 (1983); Consolidated Edison Co., 447 U.S. at 542 n.11; Martin v. City of Struthers, 319 U.S. 141 (1943). The proper approach, as upheld by this Court in Rowan v. United States Post Office Department, 397 U.S. 728, 737-38 (1970), is to reconcile these conflicting interests by establishing a means by which individual homeowners may determine for themselves which communications they will welcome and which they will exclude.

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* Different rules may apply in cases of actual obscenity.

This Court's prior rulings provide clear guidance when interests such as those asserted here are at stake. The decision below correctly applied the precedents of this Court, and no useful purpose would be served by a grant of certiorari under these circumstances.

CONCLUSION

For the foregoing reasons, the petition does not present any question warranting this Court's review, and the Writ of Certiorari should be denied.

Respectfully submitted,

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